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No. -

IN THE

Supreme Court of the United States

October Term, 1983

HOOPA VALLEY TRIBE OF INDIANS,
Petitioner,

v.

JESSIE SHORT, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Was the lower court correct first, in ruling that Congress' directive in 25 U.S.C. § 407 that timber proceeds from unallotted reservation forests be used for "members of the tribe or tribes concerned" did *not* refer to the enrolled members of a federally-recognized tribe, but rather to anyone held to be "communally concerned", thus invalidating the Secretary of the Interior's construction of the statute governing harvest of timber on 50 million acres of land on some 90 Indian reservations; and second, in using that ruling as a predicate for Tucker Act jurisdiction and liability to persons not members of any tribe?

2. Was the lower court's construction of the term "tribe" in 25 U.S.C. § 407 to mean not a politically-defined tribal community but rather a racially defined class of "Indian" descendants who have left the reservation, abandoned tribal relations, and become assimilated into the general society, consistent with the Indian Commerce Clause and the Equal Protection requirements implicit in the Due Process Clause of the Fifth Amendment?

3. In *United States v. Mitchell (Mitchell II)*, __ U.S. __, 103 S. Ct. 2961, 2969 (1983), this Court held that an Indian statutory Tucker Act claim will be sustained if the statute "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [it] impose[s]." Did the lower court err in founding jurisdiction on 25 U.S.C. § 407 and a related funds statute, but imposing liability, not by examining § 407 to determine what duties it imposes, but rather by importing into that statute duties arising from the court's construction of a separate statute which does not meet the Tucker Act jurisdictional requirements of *Mitchell II*? Does such imposition of liability

deprive petitioner of due process of law by denying an opportunity to present evidence and argument as to whether any duty imposed by 25 U.S.C. § 407 has been breached?*

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* PARTIES TO THE PROCEEDINGS BELOW: Plaintiffs in the Claims Court (Respondents here) are Jessie Short and approximately 3,800 individuals whose names appear in Appendix I. 2,303 plaintiffs have been given summary judgment to date; the status of the remainder has yet to be determined. Defendant below is the United States of America, and Petitioner, the Hoopa Valley Tribe of Indians, is the Defendant-Intervenor in the Claims Court.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

DECISIONS BELOW

Review is hereby sought of a decision of the United States Court of Appeals for the Federal Circuit reported at 719 F. 2d 1133; the court's opinion of October 6, 1983 is reproduced as Appendix A to this Petition. The Court of Claims' opinions on other issues in this case are reported at 486 F.2d 561 (1973), *cert. denied*, 416 U.S. 961 (1974) and 661 F.2d 150 (1981), *cert. denied*, 455 U.S. 1034 (1982). The earlier opinions appear as Appendices B and C to this Petition, App. 24, 40.

JURISDICTION

The decision of the Court of Appeals was entered on October 6, 1983. In No. A-466 on December 29, 1983, the Chief Justice extended the time for filing this Petition through March 4, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES AND REGULATIONS INVOLVED

1. Section 407 of Title 25, United States Code, provides:

> The timber on unallotted lands of any Indian reservation may be sold in accordance with the principles of sustained yield, or in order to convert the land to a more desirable use, under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales, after deductions for administrative expenses pursuant to section 413 of this title, shall be used for the benefit of the Indians who are members of the tribe or tribes concerned in such manner as he may direct.

2. Section 163 of Title 25, United States Code, provides:

> The Secretary of the Interior is authorized, wherever in his discretion such action would be for the best interest of the Indians, to cause a final roll to be made of the membership of any Indian tribe; such rolls shall contain the ages and quantum of Indian blood, and when approved by the said Secretary are declared to constitute the legal membership of the respective tribes for the purpose of

> segregating the tribal funds as provided in section 162 of this title, and shall be conclusive both as to ages and quantum of Indian blood . . .

3. Section 83.4 of Title 25, Code of Federal Regulations, provides:

> Any Indian group in the continental United States which believes it should be acknowledged as an Indian tribe, and can satisfy the criteria in § 83.7, may submit a petition requesting that the Secretary acknowledge the group's existence as an Indian tribe.

25 C.F.R. Part 83 - Procedures For Establishing That An American Indian Group Exists As A Tribe is reproduced in its entirety in Appendix D to this Petition, App. 152.

4. Part 111 of Title 25, Code of Federal Regulations, entitled Annuity And Other Per Capita Payments, is reproduced in Appendix E to this Petition, App. 164.

IN THE

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HOOPA VALLEY TRIBE OF INDIANS,
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v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

STATEMENT

Short v. United States involves personal claims of individual plaintiffs that the United States is liable in money damages for the Department of the Interior's failure to distribute to them income from unallotted lands on the Hoopa Square, a 140 square-mile tract of land set apart as an Indian reservation by an 1876 Executive Order. The case was filed in the Court of Claims in 1963. The decision of the Court of Appeals for the Federal Circuit below responds to motions by co-defendants United States and the Hoopa Valley Tribe to dismiss *Short* as beyond the subject matter jurisdiction granted by the Tucker Act, 28 U.S.C. § 1491.

The setting for the motions to dismiss and the court's responses to them are highly unusual. The motions to dismiss were filed in 1983 based on this Court's holding in *United States v. Mitchell, (Mitchell I)*, 445 U.S. 535 (1980). As the court noted, this inquiry raised issues "not before

articulated." App. 2. Prior to the motions to dismiss, all of the substantive rulings of the Court of Claims had been premised upon the Act of April 8, 1864, 13 Stat. 39, which authorized creation of four Indian reservations in California. App. 55. The Government and the Tribe argued in their motions to dismiss that the 1864 Act could not fairly be read as mandating compensation as required by *Mitchell I* and thereby failed to meet the jurisdictional prerequisite for Tucker Act claims "founded upon" an act of Congress.[1]

In the decision below, the Court of Appeals effectively conceded this jurisdictional defect, App. 6, 719 F.2d at 1136, but considered it "irrelevant" on the ground that a second statute, 25 U.S.C. § 407, which had never before been judicially mentioned in *Short*, sustained jurisdiction. *Id.* This § 407 governs administration of all tribal timber throughout the United States and authorizes the Secretary to utilize proceeds from timber sales on those lands "for the benefit of the Indians who are members of the tribe." Although the previous rulings of the Court of Claims had specified that *Short* plaintiffs presented individual, *not tribal* claims, based upon the 1864 Act, not § 407, the Court of Appeals held that plaintiffs were entitled to recover pursuant to 25 U.S.C. § 407 because the word "tribe" "meant only the general Indian groups communally concerned with the proceeds - not an officially organized or recognized Indian tribe." App. 7, 719 F.2d at 1136. Although the court substituted an entirely new and unrelated jurisdictional and substantive basis for recovery in *Short*, the court did not disclaim or reexamine the previous rulings based on the 1864 Act. Instead, it held that the previous rulings in *Short* were unaffected and remained binding on the United States and the Tribe as law of the case in interpreting § 407. App. 8, 719 F.2d at 1137.

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1. *United States v. Mitchell (Mitchell II)*, __ U.S. __, 103 S. Ct. 2961 (1983) was decided while the motions to dismiss were pending. Supplemental briefs were filed pointing out that notwithstanding the waiver of sovereign immunity found in the Tucker Act, *Mitchell II* still required that a statutory claim for damages against the United States be founded upon a statute that could fairly be read as mandating payment for the breach alleged.

Short was filed by 3,323 plaintiffs, later joined by over 500 intervenors, who alleged that the United States had erroneously excluded them from sharing trust income from unallotted lands on the Hoopa Square, a square tract set aside by an 1876 Executive Order as an Indian reservation pursuant to the 1864 Act.

Twenty-five miles down the Klamath River from the Square lies the Klamath River Reservation. Many of the 3,800 plaintiffs are descendants of Indians allotted parcels of land there in 1893-98. The Klamath River Reservation had been set aside by an 1855 Executive Order for the benefit of the Klamath River Indians, predominantly Yuroks. In the 1880's, however, a non-Indian challenged the existence of the Klamath River Reservation because it exceeded the four-reservation limitation in the 1864 Act. President Harrison responded by issuing an Executive Order in 1891 which annexed the Klamath River Reservation and other lands to the Hoopa Square. Together, these tracts are now usually referred to as the "Hoopa Valley Reservation."

Commencing in the 1950's, the Secretary of the Interior began to sell timber from the unallotted lands on the Square as authorized by 25 U.S.C. § 407. Pursuant to long-standing Department practice that only federally-recognized tribes and their members were eligible for § 407 timber revenues, and pursuant to a solicitor's opinion concluding that the Square remained set aside for Hoopa tribal members alone, the proceeds of these sales were made available exclusively to those enrolled by the Tribe. The Hoopa Valley Tribe was then and is now the only organized tribe on any portion of the Hoopa Valley Reservation.[2]

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2. The Yurok Tribe is a nearby federally-recognized tribe but is not formally organized and its membership is undefined. 48 Fed. Reg. 56865 (Dec. 23, 1983). Only a few of the *Short* plaintiffs are involved in Yurok tribal affairs, and most are antagonistic to attempts to organize it. No tribe is a claimant in *Short*. Unlike the Yuroks, the Hoopas of the Square organized a tribal government and adopted a constitution, some 20 years before the Secretary began timber revenue distributions.

The *Short* plaintiffs argued that the 1864 Act gave them the same rights to the timber proceeds as the members of the Hoopa Valley Tribe. They sought a money judgment for the value of their share of income from the Hoopa Square. This contention was sustained by a Commissioner of the Court of Claims in 1972. In a *per curiam* opinion, the Court of Claims upheld its Commissioner in 1973, ruling that the four-reservation limitation in the 1864 Act prevented acquisition of any vested rights in the Square, and that all individual Indians of the combined reservations thereby received equal rights in revenues from all the Reservation, both the Square and the 1891 Addition. *See* Appendix C. Plaintiffs did not assert any claim under 25 U.S.C. § 407, the statute regulating timber sales on unallotted Indian lands, so § 407 was not briefed or considered by the court. The Tribe and the Government filed petitions for certiorari but these were denied. 416 U.S. 961 (1974).

While further proceedings were under way concerning which plaintiffs were entitled to recover, the United States attempted to organize the Yurok Tribe on the Addition but the *Short* plaintiffs successfully blocked that attempt in *Beaver v. Sec'y of the Interior*, Civ. No. 79-2925-SW (N.D. Cal., Feb. 11, 1980). Plaintiffs continued to insist that their timber claims were based on individual, not tribal, rights to revenue. In 1981, the Court of Claims sitting *en banc*, in another appeal, followed the 1973 opinion and reaffirmed, as law of the case, the claimed rights based on the 1864 Act. App. 30-32, 661 F.2d at 152. Defendants again unsuccessfully petitioned for certiorari, 455 U.S. 1034 (1982).

In 1982, the Hoopa Valley Tribe retained new counsel in the *Short* litigation and in its spinoff, *Puzz v. Department of the Interior*, N.D. Calif. Civ. No. C-80-2908 TEH. (*Puzz* is a district court case brought by five of the *Short* plaintiffs seeking a declaratory judgment that the Hoopa Valley Tribe no longer has legitimate existence and an injunction to prevent the United States from dealing with the Tribe as the governing body of the Square. The *Puzz* plaintiffs argue this result is compelled by *Short*, which, they assert, should be given collateral estoppel effect in *Puzz*.)

In 1982, all parties filed requests for review by the Court of Claims of additional lower court decisions on individual entitlement of some 3,300 plaintiffs to recover. These appeals were transferred to the Court of Appeals for the Federal Circuit. At this point, while attempting to defend against the dismantlement of the Tribe because of the asserted collateral estoppel effect of *Short*, the Tribe and the Government became convinced that under *Mitchell I* the Court of Claims did not then and never did have jurisdiction of damage claims in *Short*. This Court had held the Court of Claims lacked Tucker Act jurisdiction over claims based on a statute unless the statute created a substantive right to money damages. The 1864 Act, the only statute theretofore relied upon by the Court of Claims in *Short*, did not meet this test since no statutory authority existed in 1864 for the United States to sell tribal timber, and the 1864 Act could not "fairly be read as mandating payment of money damages" for allegedly erroneous timber sales. *See Mitchell I*, 445 U.S. 535, 545 (1980). Its simple authorization for setting aside four reservations in California could not create actionable rights to timber revenues. The Tribe and the United States therefore moved to dismiss.[3]

At oral argument on the motions to dismiss plaintiffs first asserted that 25 U.S.C. § 407 was a basis for their claim. The Government and the Tribe pointedly responded that § 407 only authorized payments to "tribes" or "members of tribes," and that plaintiffs, who presented only individuals' claims, were neither. But the Court of Appeals for the Federal Circuit, recognizing that the 1864 Act could not meet the *Mitchell I/Mitchell II* test, disclaimed reliance on the 1864

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3. The United States' motion to dismiss also noted a possible defect in the Court of Appeals' appellate jurisdiction in light of the gloss placed upon the Federal Court Improvement Act of 1982 by *Aleut Tribe v. United States*, 702 F.2d 1015 (Fed. Cir. 1983). *Aleut* held that where a Claims Court judgment did not dispose of all claims and did not certify the case for interlocutory appeal, the court lacked appellate jurisdiction under 28 U.S.C. § 1292. For whatever reason, the Court of Appeals did not address the appellate jurisdiction issue here.

statute and held that jurisdiction was now founded on § 407. App. 6; 719 F.2d at 1136. Despite the new jurisdictional basis for recovery, it held that its earlier rulings based on the disclaimed 1864 Act were law of the case. App. 7-8; 719 F.2d at 1136-37.

This petition primarily concerns the lower court's misreading of 25 U.S.C. § 407, and the practical and constitutional implications of that ruling for tribes throughout the Nation.

REASONS FOR GRANTING THE WRIT

I. The Lower Court's Interpretation Of "Tribe" In The Federal Tribal Timber Statute To Mean "Communally-Concerned" Individual Indians Rather Than The Organized And Federally-Recognized Tribe Presents An Issue Of Substantial Importance To The Administration Of Indian Property Throughout The Nation.

25 U.S.C. § 407 and the regulations promulgated under it govern timber management on every Indian reservation in the country with unallotted land. Its mandate, that the beneficiaries of unallotted timber lands are the "members of the tribe or tribes concerned," has been rigorously followed by the Secretary of the Interior with respect to the Hoopa Valley Reservation and other reservations: the Secretary has consistently construed § 407 to benefit only federally-recognized tribes and those persons determined by the tribes to be their members. The Court of Appeals' unprecedented ruling that any Indian, regardless of lack of tribal membership, should share in these revenues if he can be said to be "communally concerned" with the funds does substantial violence to that important statute, its legislative history, and to the Government's administrative practice. The mischief which may flow from this serious misconstruction of § 407 is enormous:

- It introduces grave uncertainty to the process of Secretarial distribution of unallotted timber income.

- It invites claims against the United States Treasury for past distributions of income on reservations around the United States.

- It invites litigation against the Secretary and tribes challenging use of income from tribal lands which are proposed to benefit the tribe and its members.

- It threatens the financial stability of tribal governments whose reservations may be subject to such claims and opens the door to substantial erosion of the income base of reservation populations.

- It creates a new class of "Indians" -- non-members of tribes who are "communally concerned" with income from unallotted lands.

- It threatens tribal management authority over reservation timber and calls into question the entire body of Secretarial regulations which recognize tribal representatives as the appropriate source of authority for decisions concerning timber harvesting on unallotted reservation lands.

25 U.S.C. § 407 governs Bureau of Indian Affairs' commercial timber operations on approximately 90 Indian reservations which have forested "unallotted" land, *i.e.*, land not divided in severalty among individuals. App. 168. Over 50 million acres of reservation land is held in unallotted status throughout the United States. F. Cohen, *Handbook of Federal Indian Law* at 471 (1982 ed.). In the most recent six-year period for which data are available, fiscal years 1977 through 1982, the Bureau of Indian Affairs authorized harvest of $411.2 million worth of tribal timber under the authority of the statute, an average of about $70 million per year. App. 167.

The Bureau of Indian Affairs has consistently construed § 407 to mean that unallotted timber funds are collected for the use of federally-recognized Indian tribal governments and their enrolled members, a construction correct not only because of its consistency with the seminal principle of the political relationship between the United States and Indians

qua tribes, *see* Section II, *infra*, but also because it is conclusively supported by legislative history and caselaw.[4] Because of the Bureau of Indian Affairs' long-standing view that federally-recognized Indian tribes are the only beneficiaries of § 407 timber sales, the lower court's ruling that Congress meant something other than these tribes in this statute now calls into question the Secretary's handling of over $70 million of tribal income each year.[5] Indeed, in *Short* alone, plaintiffs' claims amount to more than $135 million, although the Claims Court has not yet finally quantified the Government's liability.

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4. When § 407 was amended and reenacted in 1964, Congress was fully aware that the Interior Department had construed the predecessor phrase "Indians of the reservation" to refer only to recognized members of reservation tribes. The problem perceived was that the predecessor phrase excluded members who had moved off reservations from benefits except in unusual cases. App. 173, 184-85; *see, e.g.*, 25 U.S.C. § 184; *Halbert v. United States*, 283 U.S. 753, 762-63 (1931). The new (present) phrase "members of the tribe" allowed off-reservation tribal members to continue to share the benefits, but Indians who were not tribal members never had any entitlement whether they lived on or off a reservation. As the Assistant Commissioner for Indian Affairs explained to the House Committee, "We have been considering them [the two statutory phrases] to mean the same thing anyway. We cannot give money to anybody except members of the tribe anyway, but this clarifies the law . . ." App. 182.

5. If the court is correct and Congress did not refer to federally-recognized tribes in § 407 the Government may be liable for misapplying not only timber revenues but other revenues. This is because a series of tribal income statutes designate tribal beneficiaries in much the same way as does § 407. For example, 25 U.S.C. § 314 requires compensation for most rights-of-way to be paid "for the benefit of the tribe or nation;" 25 U.S.C. § 398b directs oil and gas lease proceeds payments to "the tribe of Indians for whose benefit the reservation or withdrawal was created or who are using and occupying the land;" 25 U.S.C. § 399 directs payment for gold and other mineral mining leases to "the Indians belonging and having tribal rights on the reservation." *See also*, 25 U.S.C. §§ 319, 320, 321, 398 and 402a. Under the authority of these statutes, the Interior Department handles hundreds of millions of dollars annually relying on its view that the references to "tribes" refer to federally-recognized Indian tribal governments, and no others.

The ruling below places the Secretary in a distinctly awkward position. If he continues to distribute tribal timber revenues exclusively to recognized tribes and their members he runs the risk that disenchanted non-members, on or off the reservation, may bring breach of trust suits in the Claims Court founded on the *Short* precedent. On the other hand, if, to escape liability, he begins to include non-members in distributions of timber revenues, he will substantially erode the federal commitment to promoting tribal self-determination through the vitalization of tribal government. As this Court noted pointedly in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 149 (1980):

> Underlying the federal regulatory program rests a policy of assuring that the profits derived from timber sales will inure to the benefit of the Tribe, . . .That objective is part of the general federal policy of encouraging tribes "to revitalize their self-government" and to assume control over their "business and economic affairs." *Mescalero Apache Tribe v. Jones*, 411 U.S., at 151, . . .[T]he Federal Government has undertaken to regulate the most minute details of timber production and expressed a firm desire that the Tribe should retain the benefits derived from the harvesting and sale of reservation timber.

The import of the Court of Appeals' ruling for the daily administration and utilization of Indian forests is, perhaps, of even greater importance than the Treasury's exposure. Both allotted and unallotted Indian forests are managed under regulations recently discussed by this Court in *White Mountain Apache Tribe v. Bracker*, *supra*:

> Acting pursuant to this authority [25 U.S.C. § 407], the Secretary has promulgated a detailed set of regulations to govern the harvesting and sale of tribal timber. Among the stated objectives of the regulations is the "development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities, . . ." Tribes are expressly authorized to establish commercial enterprises for the harvesting and logging of tribal timber.

448 U.S. at 146-47. The Secretary's regulations, App. 194, codified at 25 C.F.R. Part 163, rely heavily on the correctness of the Secretary's view that federally-recognized tribal

governments are the beneficiaries of § 407 timber sales. The regulations authorize establishing Indian tribal logging enterprises "with the consent of the authorized tribal representatives." App. at 198, 25 C.F.R. § 163.6(a). Each sale of unallotted timber requires "[t]hat consent is given by the authorized representative of the tribe." App. 199, § 163.7(a). The authorized representative of the tribe may allow timber to be sold without advertisement. App. 200, § 163.9. Actual contracts for the timber must be "executed by the authorized representative of the tribe or tribal corporation." App. 203, § 163.13(a). These procedures allow tribes to insist upon employment preference for tribal members, additional environmental protection measures and other matters of significance to the planning and governance of Indian reservations. As noted, this administrative structure is founded on a statute expressing the federal policy commitment to use timber on unallotted land to strengthen tribal government.

If the Court of Appeals' interpretation of 25 U.S.C. § 407 is correct, the Secretary will likely have to modify the consent, planning and approval processes established by the regulations. Frequently, the interests of tribal governments diverge from those of non-enrolled individual Indians, most of whom, like the plaintiffs in the instant case, do not live in reservation tribal communities and therefore tend to seek short-term cash dividends rather than long-range amenities. The Secretary will probably find it impossible to reconcile these differences, and may be forced for each reservation to determine which Indians are "communally concerned" with the resource.[6] Absent review by this Court, the lower court decision will erect a serious hindrance to effective administration of the Indian timber harvest statute.

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6. *Short* held the Secretary cannot avoid liability by relying on his solicitor's opinion concerning the correct beneficiary. App. 137. Neither can he do so by relying on a tribal roll made final by 25 U.S.C. § 163, for this authority was applied to the Hoopa Valley tribal roll in 1952. App. 128.

Finally, we ask the Court to consider the impact on the tribes themselves of the § 407 interpretation. Most tribes with substantial unallotted timber lands rely heavily on timber income to finance tribal governments. *See generally, White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). On the Hoopa Valley Reservation, since over 80% of the qualified *Short* plaintiffs are not residents of the Reservation, the timber income will quickly be disbursed, with no real long-range benefit to the Reservation. Similar results would occur elsewhere. As Congress recognized when it enacted § 407, it is only the recognized tribes that are truly "communally concerned" with the Reservation. App. 175, 182, 185. *See, e.g., White Mountain Apache Tribe v. Williams*, __ F.2d __, Slip op. at 17 (9th Cir. No. 81-5348, Feb. 7, 1984) (timber statute creates interest of Indian people in their capacity as a sovereign tribe; no congressional intent to create individual § 1983 rights).

II. The Court of Appeals' Interpretation Of The Statutory Term "Tribe" As A Racial Classification Ignores The Constitutional Underpinnings For Federal Indian Law That Compel Treatment of Tribes As Politically - Not Racially-Defined Groups.

Section 407 of Title 25 provides, as we have emphasized, that the timber on unallotted lands shall benefit Indians who are "members of the tribe or tribes concerned." The court below held that "[t]he word 'tribe' (as related to Indians) has no fixed, precise or definite meaning". App. 7, 719 F.2d at 1137. In Section 407, the court concluded, "tribe" meant "the general Indian groups communally concerned with the proceeds - not an officially organized or recognized Indian tribe . . ." App. 7, 719 F.2d at 1136.[7]

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7. Ironically, although the lower court also looked to 25 U.S.C. § 479, the definition section of the Indian Reorganization Act, as a source of its definition of "tribe," App. 7, 719 F.2d at 1137, it did not mention the § 479 definition of "Indians", which includes only tribal members, descendants of such members residing on the reservation in 1934, and persons of half or more Indian blood. Few *Short* plaintiffs qualify under this standard.

The court held that qualified *Short* plaintiffs, notwithstanding their lack of tribal membership, should be considered "members of the tribe or tribes concerned." Summary judgment for 2,161 such individuals was affirmed because they are descendants of allottees of the reservation and possess a specified blood quantum, even though most of them have abandoned all tribal relations.[8] Membership in a tribe is irrelevant to qualification and the court quite clearly defined "tribe" in racial and genealogical rather than political terms. App.20.[9] This judicial construction is constitutionally suspect.

The constitutional infirmity here has two aspects. First, it is elemental that federal Indian law is founded upon the political relationship between the United States and Indian tribes. *See generally*, F. Cohen, *Handbook of Federal Indian Law*, at 1 (1982 ed.). The congressional and administrative practice of dealing with Indians through tribal organizations is rooted in the language of the Constitution. The Indian Commerce Clause grants power to Congress "[t]o regulate

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Footnote 7 (Con't)

The Indian Reorganization Act defined "tribe" broadly, of course, so disorganized "tribes" could reorganize under its provisions. Thereafter, however, the organized tribes superseded the unorganized classes of "Indians" for federal statutory purposes. In any event, the Indian vote was against application of the Act to the Hoopa Valley Reservation. App. 105.

8. Over 80% of qualified plaintiffs have left, or never were on, the Reservation according to plaintiffs' declarations in this case. See Appendix to Tribe's Request for Review of Trial Judge's Opinion Setting Standards, at 90 and Exhibits 3-5, filed in the Court of Claims June 25, 1982. Most plaintiffs are predominantly non-Indian in ancestry. As noted above, the Government recognizes the Yurok Tribe of the Addition, *see* 48 Fed. Reg. 56865 (Dec. 23, 1983), but only a few of the *Short* plaintiffs are involved in its affairs and it remains unorganized. No tribe is a claimant in *Short*.

9. The court defined the groups of plaintiffs held to be qualified under the § 407 standard. App. 21-23, 719 F.2d at 1143-44. The standards include five classes fashioned by analogy to fragmentary descriptions of how the Hoopa Valley Tribe determined its tribal membership. Three of the categories include a blood quantum requirement, and all five categories require descendancy from Indian individuals who had an historical tie to the Hoopa Valley Reservation.

Commerce . . . with the Indian Tribes." It has long been recognized that the term "tribe" as used in the Commerce Clause and in federal statutes, has a political content. As this Court said in *Montoya v. United States*, 180 U.S. 261, 266 (1901), an Indian tribe is "a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."

The tribal entity is the medium through which group rights pass from generation to generation and may be exercised by individual members. This Court has consequently held that the Congress may not constitutionally deal with a group of Indian people as a "tribe" if they lack essential tribal characteristics:

> Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.

United States v. Sandoval, 231 U.S. 28, 46 (1913). *See also*, *Perrin v. United States*, 232 U.S. 478, 484-86 (1914); *United States v. John*, 437 U.S. 634 (1978).[10] The *Short* plaintiffs lack the characteristics, political and otherwise, of a tribe; indeed, they expressly disclaim such characteristics,

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10. In *John*, the State argued the federal government lacked power under the Indian Commerce Clause to deal with the Mississippi Choctaws because of a lapse in federal recognition of a tribal organization in Mississippi. 437 U.S. at 652. In rejecting this argument this Court emphasized the original tribal status of the Choctaws, that their tribal status was clarified by proclamation of a reservation, and approval of the Constitution adopted by the tribe under the Indian Reorganization Act. Although the Court held the lapse of federal supervision over the tribe did not destroy federal power to deal with them, the Court relied on the fact that the Mississippi Choctaws were at all relevant times a tribe. 437 U.S. at 652-53.

claiming only individual entitlement. For example, in Plaintiffs' Memo in Opposition to Defendant's Motion to Substitute the Yurok Tribe as Plaintiff at 22, filed July 27, 1979, plaintiffs said (original emphasis):

> Plaintiffs argued then [in 1963]—as they do now—that they derived their right to share in the income of the Hoopa Valley Reservation not from membership in a *tribe* but from their common status as Indians or descendants of Indians who settled on the Reservation.

The trial judge in that proceeding, and ultimately the full Court of Claims, adopted plaintiffs' view of their status. App. 31-32, 661 F.2d at 155. It is doubtful that the court can now arbitrarily call such plaintiffs a "tribe", consistent with Congress' Commerce Clause power. *See also, Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

Second, Congressional power to deal with Indians as a racial, as opposed to a political group, is constrained by the Equal Protection guaranties implicit in the Due Process Clause of the Fifth Amendment. Several recent cases have considered whether federal statutes singling out tribal Indians as a class violate this constitutional standard. This Court has rejected these challenges, but only because the constitutionally-recognized status of tribes as separate political communities distinguishes Indians who are members of tribes from other classes of Indians and other persons. Thus, in *United States v. Antelope*, the Court stated that

> [F]ederal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions. Federal regulation of tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a " 'racial' group consisting of 'Indians' ".

430 U.S. 641, 646 (1977). *See also id.* at 646, n.7.[11] Similarly, in *Morton v. Mancari*, 417 U.S. 535 (1974), the Court upheld

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11. Unlike this Court's view in *Antelope* that Indians who had abandoned tribal life or were "terminated" by statute were not within

against an Equal Protection challenge an employment preference extended to Indians by the Bureau of Indian Affairs pursuant to the Indian Reorganization Act. The Court took pains to emphasize, however, that the preference was not directed toward a "racial group consisting of 'Indians'" but applied only to members of "federally-recognized" tribes. The preference thus excluded many individuals who could be racially "classified as 'Indians.'" *Id.* at 553-54, n.24.[12]

It is apparent that racial distinctions, as opposed to political ones, are subject to much stricter constitutional scrutiny. *E.g., Keyes v. School Dist. No. 1*, 413 U.S. 189, 195-98 (1973); *Korematsu v. United States*, 323 U.S. 214, 216 (1944). Thus, the court creates constitutional mischief, since regulatory programs based on the unique status of members of federally-recognized tribes are not subject to such strict scrutiny, but will be upheld so long as the special treatment "can be tied rationally to the fulfillment of Congress' unique obligations toward Indians." *Morton v. Mancari*, 417 U.S. at 555 (1974); *accord, Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 83-85 (1977).

In *Short*, the Court of Appeals attributed to Congress an intention to act inconsistently with the dominant federal policy of furthering tribal self-determination. *See generally, White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 149

Footnote 11 (Con't)

the reach of the Major Crimes Act, 430 U.S. at 646, n.7, the lower court held that "Indians" who had abandoned ties with the Hoopa Valley Reservation nevertheless remained beneficiaries of the tribal timber statute. App. 17, 719 F.2d at 1141; *but see* App. 165, 25 C.F.R. §§ 111.2, 111.4.

12. *See also, Washington v. Colville Confederated Tribes*, 447 U.S. 134, 160-61 (1980); *United States v. Washington*, 520 F.2d 676, 682, n.1 (9th Cir. 1975); *cert. denied*, 423 U.S. 1086 (1976).

(1980); *Bryan v. Itasca County*, 426 U.S. 373, 388, n.14 (1976); Indian Self-Determination and Education Assistance Act of 1974, P.L. 93-638, 25 U.S.C. § 450 *et seq.* Tribal rights are to be denied the federally-recognized tribe and distributed to individual non-tribal Indians. The reference to "tribe" in § 407 should not be read in a way that creates such grave constitutional problems under the Commerce Clause and the Due Process Clause.

In other contexts, the Courts of Appeals have carefully defined a threshold, which includes a political component, to qualify a group as a "tribe" for federal statutory or treaty purposes, thereby evading such problems. In the land claims cases arising under 25 U.S.C. § 177 and in the treaty fishing cases, the courts have insisted that to constitute a "tribe" the group must survive as a distinct community and exercise political control over a territory even if ill-defined. *See e.g., Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 582-85 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979); *United States v. Washington*, 641 F.2d 1368, 1373 (9th Cir., 1981), *cert. denied*, 454 U.S. 1143 (1982). Since the rulings of the *Short* court are now based on § 407, plaintiffs seek the rights of a "tribe", yet they do not meet the threshold political characteristics of groups which can transmit, exercise or assert "tribal" rights as "tribes."

To allow judicial definition of "tribes" in racial rather than political terms, is to set dangerous precedent. There is no reason to impute to Congress an intention to abandon the protective umbrella inherent in the traditional definition of "tribe" in favor of a vulnerable racially-defined one. Further, the constitutional quagmire created here is easily avoided. In *United States v. Sandoval*, 231 U.S. at 47 (1913) this Court held:

> As was said in *United States v. Holliday*, 3 Wall. 407, 419: "In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same. If they are a tribe of Indians, then, by the

Constitution of the United States, they are placed, for certain purposes, within the control of the laws of Congress."

Congress and the Executive have explicitly provided avenues by which a group which seeks tribal rights can be determined to be a tribe. Recently, the Department of the Interior adopted detailed regulations establishing procedures for determining that an American Indian group exists as an Indian tribe. These regulations look to evidence of the group's continuous Indian identity, long-standing relationships with other governments, residence in a specific area viewed as distinctly Indian, maintenance of tribal political influence in accordance with governing documents, lists of members, and other attributes. App. 156-58, 25 C.F.R. § 83.7. But the plaintiffs in *Short* have not sought tribal status by these means.

Deference to the Department of the Interior's primary jurisdiction over identification of tribes not only excuses federal judges from the hazardous task of fashioning standards for determining the existence of tribal status, but also allows the Executive Branch to uphold its trust duty to protect the rights of those Indians who really compose tribes. If the concept of "tribe" has lost "definite meaning," as the lower court concluded, App. 7, 719 F.2d at 1137, it will be impossible to prevent multiple and inconsistent adjudication of tribal rights in suits brought by non-tribal individuals. In fact, it was precisely this danger that led the First Circuit Court of Appeals recently to adhere in *James v. Watt*, 716 F.2d 71, 72 (1st Cir. 1983) *cert. pending* in No. 83-623, to an earlier ruling that the Indian Non-Intercourse Act granted land claims causes of action to tribes that individuals cannot assert solely on their own behalf. *Epps v. Andrus*, 611 F.2d 915, 917 (1st Cir. 1979).

In § 407 Congress explicitly referred to rights of "tribes," a term that does not exist in a vacuum. To allow the lower court to redefine that concept in racial terms and allow that class to assert rights and privileges which flow from tribal citizenship, is to ignore the constitutional threshold for

Government-Indian relations. It sets a dangerous and disruptive precedent for other areas of the law where tribal rights are asserted.

III. The Court Of Appeals' Ruling Ignores The Mitchell II Requirement That To Present A Valid Tucker Act Claim The Source Of Substantive Law Relied Upon Must Be Fairly Interpreted As Mandating Compensation For The Damages Sustained.

This case substantially broadens access to the new Claims Court by expansively construing 28 U.S.C. § 1491. In *Mitchell II*, this Court, relying upon *United States v. Testan*, 424 U.S. 392, 400 (1976) and *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967) reconfirmed that to state a claim cognizable under the Tucker Act, the claimant must demonstrate that the source of substantive law relied upon "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." __U.S.__, 103 S. Ct. at 2968. Thus, although the Tucker Act waives the sovereign immunity of the United States, in order to state a valid Tucker Act claim "founded . . . upon . . . any Act of Congress" the court must determine whether the statute

> can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [it] impose[s].

Id. at 2969. This is a subject matter jurisdiction inquiry. *Id.* at 2974.

The Court of Appeals' attempt, in response to the motions to dismiss, to squeeze *Short* into conformity with the *Mitchell II* mandate merely brings the court back to the error rejected by this Court in *Mitchell I*. One statute has emerged as the jurisdictional and substantive heart of the case, 25 U.S.C. § 407, yet it was not mentioned by the court until 1983, 10 years after the Court of Claims ruled that "the source of all [plaintiffs'] claims" was the 1864 Act. App. 55. The Court of Appeals now recognizes that the 1864 Act does not meet the *Mitchell II* test because it does not mandate

compensation to anybody and could not command payment of timber revenues to plaintiffs in *Short* because it was enacted 46 years before Congress conveyed the right to reservation timber sale proceeds. App. 6; *see, Mitchell I*, 445 U.S. at 545 (1980); *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103 (1949). But while the court disclaimed reliance on the 1864 Act as the jurisdictional basis of its *Short* rulings, it nevertheless adhered to the analysis founded upon that discredited statute both to put a gloss on its interpretation of § 407, and as a substantive basis for recovery as "law of this case." App. 8, 719 F.2d at 1137.

Thus, in support of its conclusion that the term "tribe" in § 407 does not mean "an officially organized or recognized Indian tribe", App. 6-7, 719 F.2d at 1136, the court notes that this "is the proper interpretation if, as has already been held, qualified plaintiffs are entitled to recover a proper share of the proceeds." *Id.* But that conclusion, of course, was founded upon the 1864 Act without reference to the rights created or duties imposed by § 407. Such circular reasoning violates the letter and spirit of *Mitchell II*.

This Court's admonition that the claimant must point to a statute which can be fairly interpreted as mandating compensation for the damages sustained punctures the lower court's ruling. With respect to statutory claims, Congress in the Tucker Act has waived the sovereign immunity of the United States only as to claims truly "founded" upon an act of Congress. In *Mitchell II* this Court cited with approval *Eastport S.S. Corp. v. United States*, 372 F.2d 1002 (Ct. Cl. 1967). There the court explained,

> [T]he historical boundaries of our competence have excluded those instances in which the basis of the federal claim - be it the Constitution, a statute, or a regulation - cannot be held to command, in itself and as correctly interpreted, the payment of money to the claimant, but in which some other principle of damages has to be invoked for recovery.

Id. at 1008. But it is painfully apparent that § 407, although it may mandate payment to tribes or their members, does not mandate payment to plaintiffs. Liability is *really* being

imposed, not because of a Secretarial breach of the duty imposed by the substantive statute now relied upon, as *Mitchell II* requires, but rather because the court had *previously* ruled that the Secretary violated *another* statute - the 1864 Act, a statute which imposes no relevant duty. The lower court's attempted bootstrap compliance with *Mitchell II* using law of the case principles is improper and a significant extension of the limited Tucker Act jurisdiction.[13] The lower court's substitution of a new substantive and jurisdictional foundation for *Short* while leaving intact and binding on the parties all the previous *Short* rulings, is reminiscent of the magician's "tablecloth" trick: with a deft flick of his wrist, he removes the tablecloth, leaving the china, silver and glassware undisturbed on the table.

This is no mere technical defect. The lower court's analysis is contaminated by matters not germane to § 407 and ignores other factors relevant to what "*tribes*" can be considered "*concerned*" with the portion of the Reservation at issue and who are the members of those tribes. When the question whether § 407 can support relief in *Short* is squarely addressed, as it should have been but was not, it compels a different analysis, different evidence, and, the Tribe insists, a different result.

Section 407 does not mandate payment to non-tribal plaintiffs.[14] From the outset of the *Short* litigation, plaintiffs

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13. Although this Court spoke in *Mitchell II* of the Tucker Act as being jurisdictional, it is readily apparent that it does not operate in the same jurisdictional sense as does, for example, 28 U.S.C. § 1332, the diversity of citizenship statute. Under that statute, once a plaintiff demonstrates diversity and the required amount in controversy, he is free to assert a claim based on federal or state statutory law, common law, or principles of equity. The Tucker Act, however, operates quite distinctly since the sovereign immunity of the United States is implicated. In order to come within the waiver of sovereign immunity, the claimant must demonstrate a claim founded upon an act of Congress that can be fairly read as mandating compensation to plaintiff for the breach alleged.

14. Much less does 31 U.S.C. § 1321 mandate payment of deposited timber revenues to plaintiffs. The Court of Appeals' reliance on § 1321 as an alternate jurisdictional basis, App. 8, merely resurrects the erroneous

conceded that they were not members of the Hoopa Valley Tribe, not eligible for membership in the Tribe, and that they did not assert tribal rights from any other tribe. The Secretary of the Interior has literally followed the statute's mandate by making available the proceeds of timber sales on unallotted Hoopa Valley Indian Reservation lands to the only organized and federally recognized tribe of the Reservation, the Hoopa Valley Indian Tribe. Yet liability is imposed. The lower court thereby strips the "fair interpretation" requirement for jurisdiction over statutory claims of all meaning.[15]

CONCLUSION

For the reasons set forth herein, a writ of certiorari should be granted.

Respectfully submitted,

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March 3, 1984.

Footnote 14 (Con't)

analysis soundly rejected by this Court in *Mitchell I*. While § 1321, like the General Allotment Act in *Mitchell I*, creates a trust, it creates no rights or duties relevant to the claim presented here. *See Mitchell II*, __U.S.__, 103 S. Ct. 2971-72 (1983).

15. The Court of Appeals' attempt simultaneously to disclaim the 1864 Act as a jurisdictional base and preserve the substantive rulings based upon it, carries the court into numerous distortions and inconsistencies. Thus, notwithstanding the fact that the ultimate issue in *Short* now becomes whether plaintiffs qualify as "members of the tribe or tribes concerned" under § 407, the Court of Appeals continues to insist that on its merits this case "is a matter of individual entitlement, not of tribal membership. . . ." App. 9, 719 F.2d at 1137. Similarly, the court retains its earlier entitlement ruling that the Hoopa tribal standards are to be used as a general guide to determine entitlement. The court has therefore created the anomalous situation that it is using Hoopa tribal standards to determine what non-members of the Tribe should be considered

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Footnote 15 (Con't)

"members of the tribe or tribes concerned" under § 407. Surely, this is self-contradictory. *Also compare* App. 7 *with* App. 10, n.10, *and* App. 20.

Furthermore, the court declares that nothing in its opinion interferes in any way with the decision of the Yuroks to establish a tribe and if they do so "they are free to vote any membership standard they desire." App. 20, 719 F.2d at 1143. If this *were* to occur, however, one must wonder whether the members of the Yurok Tribe would be entitled to participate in these § 407 proceeds or whether the Secretary would be bound to say that *Short* concerned *individual entitlement*, and that only qualifying *Short* plaintiffs, regardless of non-membership in any tribe, are entitled to recover. One interpretation is inconsistent with the *Short* holding and the other violates the plain meaning of § 407.